Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-231

PENSION BENEFIT GUARANTY CORPORATION,
Appellant

v.

YAHN & MCDONNELL, INC. and THE PENNSTAR COMPANY,
Appellees

No. 86-253

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS UNION LOCAL NO. 115
PENSION PLAN, ET AL.,
Appellants

v.

YAHN & MCDONNELL, INC. and
THE PENNSTAR COMPANY,
Appellees

On Appeal from the United States Court of Appeals
for the Third Circuit

BRIEF FOR THE APPELLANTS IN NO. 86-253

RICHARD H. MARKOWITZ
Counsel of Record
PAULA R. MARKOWITZ
R. DAVID WALK, JR.
Markowitz & Richman
121 South Broad Street
1100 North American Building
Philadelphia, PA 19107
(215) 875-3100

Dated: January 30, 1987

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 238-2000

QUESTION PRESENTED

Section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1401(a)(3)(A), provides that, after the trustees of a multiemployer pension plan have made an initial determination of an employer's liability upon withdrawal from the plan, their determination shall be accorded a presumption of correctness in any subsequent arbitration proceeding unless the employer shows by a preponderance of the evidence that the trustees' determination was unreasonable or clearly erroneous.

The question presented is whether Section 104(2) violates the Due Process Clause of the Fifth Amendment because of the supposed bias of the trustees.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the parties to this proceeding (No. 86-253) are Robert E. Zimmer, Michael Paolella, John P. Morris and James Smith, Jr., Trustees of the United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. The Statutory Background	3
B. The Statutory Process For Determining Withdrawal Liability	4
C. The Facts Of This Case	8
SUMMARY OF ARGUMENT	13
ARGUMENT	14
A. The Appropriate Constitutional Test For Decisionmaker Bias	14
B. The Court Of Appeals Erroneously Concluded That Trustees Are Inevitably Biased	19
C. Multiemployer Pension Plan Trustees Do Not Act As Adjudicative Decisionmakers When They Calculate Withdrawal Liability.	23
D. The Presumption Of Correctness Accorded To Trustees' Assessments Of Withdrawal Liability Is Consistent With The Arbitrary And Capricious Standard Used To Evaluate Decisions By Trustees	27
E. The Court Of Appeals' Ruling That Assessments Of Withdrawal Liability Are To Be Determined De Novo By An Arbitrator Would Threaten The Financial Stability Of Pension Funds	32
CONCLUSION	33

TABLE OF AUTHORITIES

Cases: Page

Aetna Life Insurance Company v. Lavoie, 106 S. Ct. 1580 (1986) 15, 16, 19

Anderson v. Ciba-Geigy Corp., 759 F.2d 1518 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 410 (1985). 28

Berry v. Ciba-Geigy Corp., 761 F.2d 1003 (4th Cir. 1985) 28, 29

Board of Trustees v. Thompson Bldg. Materials, Inc, 749 F.2d 1396 (9th Cir.1984), *cert. denied*, 105 S. Ct. 2116 (1985) 10

Bowen v. United States Postal Service, 459 U.S. 212 (1983) 31

Bueneman v. Central States, Southeast and Southwest Areas Pension Fund, 572 F.2d 1208 (8th Cir. 1978) 28

Califano v. Yamasaki, 442 U.S. 682 (1979)..... 18

Carter v. Central States, Southeast and Southwest Areas Pension Fund, 656 F.2d 575 (10th Cir. 1981) 28, 29

Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 105 S. Ct. 2833 (1985)..... 28

Clayton v. United Automobile Workers, 451 U.S. 679 (1981) 31

Connolly v. PBGC, 106 S. Ct. 1018 (1986).... 3, 4, 30

Crews v. Central States, Southeast and Southwest Areas Pension Fund, 788 F.2d 332 (6th Cir. 1986) 28, 29

Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983)..... 31

Friedman v. Rogers, 440 U.S. 1 (1979)..... 22

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Gibson v. Berryhill, 411 U.S. 564 (1973) . . . 10, 15, 22

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) 31

In re Murchison, 349 U.S. 133 (1955) 16

Jestings v. New England Telephone and Telegraph Co., 757 F.2d 8 (1st Cir. 1985) 28

Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund, 762 F.2d 1137 (1st Cir. 1985) (en banc). 10, 21, 26, 33

Malhiot v. Southern California Retail Clerks Union, 735 F.2d 1133 (9th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985) 27, 28

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) . 10, 16, 19, 23, 25

Mathews v. Eldridge, 424 U.S. 319 (1976) 10, 18

Morrissey v. Brewer, 408 U.S. 471 (1972) 18

Morse v. Stanley, 732 F.2d 1139 (2d Cir. 1984) . . . 28

Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc., 637 F.2d 357 (5th Cir. 1981), *cert. denied*, 454 U.S. 836 (1981) 28

PBGC v. R.A. Gray & Co., 467 U.S. 717 (1984) . . 3, 4, 30

Republic Industries, Inc. v. Teamsters Joint Council No. 83, 718 F.2d 628 (4th Cir.), *cert. denied*, 467 U.S. 1259 (1984) 11

Schweiker v. McClure, 456 U.S. 188 (1982) . . . 10, 17, 18, 19, 23, 24

Stewart v. National Shopmen Pension Fund, 795 F.2d 1079 (D.C. Cir. 1986) 28, 29

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d 843 (2d Cir.), *cert. denied sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers Int'l*, 467 U.S. 1259 (1984) 11

Tumey v. Ohio, 273 U.S. 510 (1927) 10, 14, 22

Vaca v. Sipes, 386 U.S. 171 (1967) 31

Walters v. National Association of Radiation Survivors, 105 S. Ct. 3180 (1985) 18

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 10, 22

Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981) 28

Washington Post v. Washington-Baltimore Newspaper Guild, Local 35, 787 F.2d 604 (D.C. Cir. 1986) 27

Washington Star Co. v. Int'l Typographical Union Negotiated Pension Plan, 729 F.2d 1502 (D.C. Cir. 1984) 11

Wolf v. National Shopmen Pension Fund, 728 F.2d 182 (3d Cir. 1984) 28

Woodward Sand Co. and Operating Engineers' Pension Trust, 3 EBC (BNA) 2351 (1982) (Kaufman, Arb.) 26

Constitution, statutes and regulations:

U.S. Const., Amend. V (Due Process Clause) ... 3, 13, 14, 15, 17, 25, 26, 33

28 U.S.C. §1252 2

Constitution, statutes and regulations: Page

Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1001 *et seq.* 2, 3
29 U.S.C. §1002(21)(A) 8
29 U.S.C. §1002(37)(A) 8
29 U.S.C. §1104 11
29 U.S.C. §1109 ..... 11, 20
29 U.S.C. §1109(a) 20
29 U.S.C. §1301(a)(10)(A) 4
29 U.S.C. §1301(b) 8
29 U.S.C. §1381(b) 4
29 U.S.C. §1391 5
29 U.S.C. §1391(b) 5
29 U.S.C. §1391(b)(1)(A) 5
29 U.S.C. §1391(b)(1)(B) 5
29 U.S.C. §1391(b)(1)(C) 5
29 U.S.C. §1391(b)(2)(E)(ii) 5
29 U.S.C. §1391(b)(3)(B) 5
29 U.S.C. §1391(b)(4)(D)(ii) 5
29 U.S.C. §1391(c)(2) 5
29 U.S.C. §1391(c)(3) 5
29 U.S.C. §1391(c)(4) 5
29 U.S.C. §1391(c)(5)(A) 5
29 U.S.C. §1393(a) 6, 25, 32
29 U.S.C. §1393(c) 4

TABLE OF AUTHORITIES—*(Continued)*

Constitution, statutes and regulations: Page

29 U.S.C. §1394 5

29 U.S.C. §1394(a) 24

29 U.S.C. §1399(b)(1) 6

29 U.S.C. §1399(b)(2)(A) 6

29 U.S.C. §1399(b)(2)(B) 6

29 U.S.C. §1401 6

29 U.S.C. §1401(a)(2) 6

29 U.S.C. §1401(a)(3) 4, 12

29 U.S.C. §1401(a)(3)(A) 2, 6, 14, 27, 29, 33

29 U.S.C. §1401(a)(3)(B) 7

29 U.S.C. §1401(b)(2) 7

29 U.S.C. §1401(c) 7

Labor Management Relations Act, §302(c)(5), 29 U.S.C. §186(c)(5) 8

Miscellaneous:

Arbitration of Disputes in Multiemployer Plans, 50 Fed. Reg. 34679 (1985) (to be codified at 29 C.F.R. Pt. 2641) 6

126 Cong. Rec. 20178 (1980) 3

H.R. Rep. No. 869, 96th Cong., 2d Sess. (1980) . 4, 5, 7, 21, 24, 33

Sen. Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076: The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* (Comm. Print 1980) 7, 13, 26, 33

Comment, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 Duq. L. Rev. 1033 (1985) 28

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-231

PENSION BENEFIT GUARANTY CORPORATION,
Appellant

v.

YAHN & MCDONNELL, INC. and THE PENNSTAR COMPANY,
Appellees

No. 86-253

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS UNION LOCAL NO. 115
PENSION PLAN, ET AL.,
Appellants

v.

YAHN & MCDONNELL, INC. and
THE PENNSTAR COMPANY,
Appellees

On Appeal from the United States Court of Appeals
for the Third Circuit

BRIEF FOR THE APPELLANTS IN NO. 86-253

OPINIONS BELOW

The opinion of the court of appeals (PBGC JS[1] App. A, 1a-40a) is reported at 787 F.2d 128. The opinion of the district court (PBGC JS App. B, 41a-49a) is unreported.

1. References to "PBGC JS" are to the Jurisdictional Statement of the Pension Benefit Guaranty Corporation, No. 86-231 (filed August 14, 1986), which seeks review of the same judgment.

JURISDICTION

The judgment of the court of appeals (PBGC JS App. C, 50a-51a) was entered on March 31, 1986. The Pension Benefit Guaranty Corporation (PBGC), a wholly-owned government corporation and an agency of the United States, was granted leave to intervene post-judgment for the purposes of seeking rehearing and, if necessary, review in this court (PBGC JS App. D, 52a-53a). The PBGC's petition for rehearing was denied on April 23, 1986 (PBGC JS App. E, 54a-55a). The petition for rehearing of the United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan (the Plan), *et al.*, was also denied on April 23, 1986. (Plan JS App. A., A-1). The PBGC filed a notice of appeal to this Court on May 21, 1986 (PBGC JS App. F, 56a-57a). The Plan also filed a notice of appeal to this Court on May 21, 1986 (Plan JS App. B, A-2).

On December 1, 1986, the Court noted probable jurisdiction of the appeal of the PBGC (No. 86-231) and the Plan (No. 86-253). The Court also ordered the cases consolidated.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1252.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§1001 *et seq.*, are set forth at PBGC JS App. H, 60a-67a. The provision of the statute held unconstitutional by the court of appeals is Section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. §1401(a)(3)(A), which provides:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

The constitutional provision involved is the Due Process Clause of the Fifth Amendment, which provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

The following statement is adopted from the statement in the Jurisdictional Statement of the PBGC.

A. The Statutory Background.

The history of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, has been described in detail by this Court in *Connolly v. PBGC*, 106 S. Ct. 1018, 1021-1022 (1986), and *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 721-723 (1984). In brief, it became apparent to Congress that the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 *et seq.*, "did not adequately protect plans from the adverse consequences that resulted when individual employers terminate[d] their participation in, or [withdrew] from, multiemployer plans." *Gray*, 467 U.S. at 722. Congress further concluded that ERISA created undesirable incentives for employers to withdraw, leaving plans with inadequate funding. The absence of effective withdrawal liability provisions encouraged a " 'last man out' mentality, with employers withdrawing from plans to avoid possible plan termination liability." 126 Cong. Rec. 20178 (1980) (remarks of Sen. Javits).

The MPPAA was designed primarily to discourage employer withdrawals from multiemployer pension plans, while at the same time not acting as a disincentive to new employers who might consider becoming contributors to such plans. *See* H.R. Rep. No. 869, Pt. II, 96th Cong., 2d Sess. 15 (1980); *Connolly*, 106 S. Ct. at 1021-1022; *Gray*, 467 U.S. at 721-723. As the Court stated in *Connolly*, the MPPAA "safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan." 106 S. Ct. at 1026. Thus, "the Act requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of the plan's assets." *Gray*, 467 U.S. at 725, quoted in *Connolly*, 106 S. Ct. at 1022. Various determinations made by the trustees in the process of collecting this debt are presumed correct under Section 104(2) of the MPPAA, 29 U.S.C. §1401(a)(3), "in order to ensure the enforceability of employer liability." H.R. Rep. No. 869, Pt. I, *supra*, at 86.

B. The Statutory Process For Determining Withdrawal Liability.

Withdrawal liability is an employer's statutory share of the pension plan's "unfunded vested benefits." 29 U.S.C. §1381(b). "Unfunded vested benefits" are "(A) the value of nonforfeitable benefits under the plan, less (B) the value of the assets of the plan." 29 U.S.C. §1393(c). The plan sponsor[2] determines the employer's share of unfunded vested benefits by using one of several

2. The "plan sponsor" of the multiemployer pension plan is defined in 29 U.S.C. §1301(a)(10)(A) as the plan's joint board of trustees.

allocation methods specified in 29 U.S.C. §1391. The "presumptive" or "basic" method of allocation, which was employed in this case, is set forth in Section 1391(b), and alternative allocation methods are set forth in Sections 1391(c)(2), (3) and (4). In addition, the Act permits the plan sponsor to use an allocation method of its own design, subject to the PBGC's approval based on the PBGC's determination that the plan's method will "not significantly increase the risk of loss to plan participants and beneficiaries or to the [PBGC]." 29 U.S.C. §1391(c)(5)(A).[3] The MPPAA requires that the allocation method applied to a specific withdrawal may not be different from the plan-wide method in effect on the date of that withdrawal, and the Act further requires uniform application to all withdrawing employers of whichever allocation method the plan sponsor has selected. 29 U.S.C. §1394. *See* H.R. Rep. No. 869, Pt. I, *supra*, at 85.

Under the presumptive method of allocation, the plan sponsor must determine a withdrawing employer's proportional share of each of three different categories of unfunded vested benefits. 29 U.S.C. §1391(b)(1)(A), (B) and (C). These shares are derived from fractions comparing the employer's contributions to the plan to the contributions made by all employers to the plan during the same periods. 29 U.S.C. §§1391(b)(2)(E)(ii), 1391(b)(3)(B), 1391(b)(4)(D)(ii).

The amount of an employer's withdrawal liability also depends on the value of the plan's unfunded vested benefits (nonforfeitable benefits minus assets) that are subjected to the allocation process. In calculating the value of nonforfeitable benefits under a pension plan, it

3. *See* H.R. Rep. No. 869, Pt. I, *supra*, at 77:

> The bill provides a basic method for determining an employer's withdrawal liability, three alternative methods which a plan may elect, and allows plans to develop additional allocation methods. The basic method[] is the one that applies unless a plan is amended to adopt a different method.

is necessary to use certain "actuarial assumptions and methods," which either must follow regulations that the PBGC is authorized to issue[4] or be "reasonable" and "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. §1393(a).

As soon as is practicable after an employer's withdrawal from a pension plan, the plan trustees must notify the employer of "the amount of the liability" and "the schedule for liability payments" and make demand for payment. 29 U.S.C. §1399(b)(1). The employer may then ask the plan trustees to review any specific matter relating to the determination of liability, may identify any inaccuracies in the determination, and may "furnish any additional relevant information." 29 U.S.C. §1399(b)(2)(A). The trustees must review the issues raised by the employer and notify the employer of their decision and the basis for it. 29 U.S.C. §1399(b)(2)(B).

The MPPAA also prescribes procedures to be followed if, after the above-described steps, a disagreement remains between the pension plan and the employer over any determination made by the plan trustees relating to the employer's withdrawal liability. 29 U.S.C. §1401. Either the employer or the plan may initiate arbitration, which must be conducted in "accordance with fair and equitable procedures" (29 U.S.C. §1401(a)(2)) that have been promulgated by the PBGC.[5] Section 1401(a)(3)(A) of the MPPAA, the provision found unconstitutional by the court of appeals, provides:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party

---

4. The PBGC has not yet decided whether to promulgate regulations concerning appropriate actuarial assumptions.

5. *Arbitration of Disputes in Multiemployer Plans*, 50 Fed. Reg. 34679 (1985) (to be codified at 29 C.F.R. Pt. 2641).

> contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

The Act also accords a presumption of correctness to the actuarial assumptions and methods used to determine a plan's unfunded vested benefits. 29 U.S.C. §1401(a)(3)(B).

Congress explained that "[t]hese [presumptions] are necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination." H.R. Rep. No. 869, Pt. I, *supra*, at 86. *See also* Sen. Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076: The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 20-21 (Comm. Print 1980) [hereinafter cited as *Senate Labor Summary*].[6] Finally, the MPPAA vests the federal district courts with jurisdiction to review the arbitrator's final decision. 29 U.S.C. §1401 (b)(2). In any such proceeding, "there [is] a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. §1401(c).

---

6. The *Senate Labor Summary* stated (at 20-21):

> The Committee includes the presumption to reduce the likelihood of dispute and delay over technical actuarial matters with respect to which there are often several equally "correct" approaches. Without such a presumption, a plan would be helpless to resist dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan. The presumption can be rebutted in those cases where injustice would otherwise result to the withdrawing employer.

C. The Facts Of This Case.

Yahn & McDonnell, Inc. (Yahn) entered into a series of collective bargaining agreements with United Retail and Wholesale Employees Teamsters Union Local No. 115 (the Union) (C.A. App. 15), the last of which was a three-year agreement executed in January, 1980 (C.A. App. 7, 15).[7] These collective bargaining agreements required Yahn to make contributions to the United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan (PBGC JS App. A, 6a).

The Pension Plan is a multiemployer pension trust established under Section 302 (c) (5) of the Labor Management Relations Act, 29 U.S.C. §186 (c) (5), and a "multiemployer plan" within the meaning of ERISA, 29 U.S.C. §1002 (37) (A) (C.A. App. 5). The Plan is administered by four trustees, two of whom were appointed by contributing employers and two of whom were appointed by the Union (PBGC JS App. A, 6a). The trustees are "fiduciaries" within the meaning of ERISA, 29 U.S.C. §1002 (21) (A).

Yahn made all of the contributions required by the collective bargaining agreements until November, 1981, when it ceased operations and withdrew from the Pension Plan (PBGC JS App. A, 6a). In April, 1982, the Plan issued a demand for payment of approximately $458,000 in withdrawal liability (*ibid.*).[8] In its demand for payment, the Plan stated, *inter alia*, that it had elected to use the presumptive method for determining Yahn's liability and that, "[u]nder this method, the Fund Actuary,

---

7. The court of appeals' opinion incorrectly states that Yahn's last agreement with the Union was executed in December, 1980. *See* PBGC JS App. A, 6a.

8. The Plan advised Yahn that the Plan reserved the right to look to Yahn's parent company, appellee Pennstar, for payment if Yahn could not afford to pay the withdrawal liability itself. *See* 29 U.S.C. §1301(b); PBGC JS App. A, 6a-7a & n.2.

Peat, Marwick, Mitchell & Co., has determined the withdrawal liability of Yahn & McDonnell, Inc." (C.A. App. 46, 109).

In July, 1982, Yahn made a request for review of the liability determination (PBGC JS App. A, 7a). Yahn requested consideration of several specific issues, including the actuarial assumptions employed to calculate the Plan's unfunded vested benefits (C.A. App. 56). The trustees reviewed their initial assessment of liability at a meeting attended by counsel for the Pension Plan, counsel for Yahn, and two employees of Peat, Marwick, Mitchell & Co., the Plan's actuary (C.A. App. 102-116). At the conclusion of the trustees' review, Yahn was advised that the withdrawal liability assessment would not be altered (PBGC JS App. A, 7a).

Yahn invoked its right to arbitration, but the arbitration proceeding was placed in abeyance pending resolution of the constitutional issues raised by Yahn in this litigation (PBGC JS App. A, 7a). No arbitration proceeding has ever been conducted concerning Yahn's specific disagreements with the trustees' assessment of withdrawal liability.

The Pension Plan and its trustees commenced this action in the United States District Court for the Eastern District of Pennsylvania to collect Yahn's withdrawal liability (PBGC JS App. A, 7a). In its answer, Yahn raised numerous constitutional challenges to the MPPAA; among other things, Yahn asserted that the MPPAA denied it due process because the initial determination of liability was made by biased trustees (*ibid.*). After briefing, the district court upheld the MPPAA against all of Yahn's constitutional attacks, but dismissed the Plan's request for attorneys' fees, costs, and liquidated damages (PBGC JS App. B, 41a-49a).

Yahn appealed from the adverse judgment against it, and the Pension Plan appealed from the denial of attorneys' fees, costs, and liquidated damages. Relying on "Congress' obvious desire to ensure the solvency and

stability of pension plans" (PBGC JS App. A, 12a), the court of appeals first affirmed the district court's ruling that the MPPAA authorizes the Plan to maintain an action to collect withdrawal liability payments pending arbitration. Thus, the court of appeals upheld the district court's award of interim liability payments to the Plan (*ibid.*). Second, the court of appeals agreed with the Plan that the MPPAA compels an award of attorneys' fees, costs, and liquidated damages upon a judgment in favor of a pension plan for delinquent payments. With respect to this issue, therefore, the court of appeals reversed the district court's ruling that such an award would be premature prior to arbitration (*id.* at 13a-14a).

Finally, in a divided decision, the court of appeals reversed that portion of the district court's judgment upholding the MPPAA against Yahn's procedural due process challenge. The court of appeals did not question the district court's conclusion that the statutory presumptions of correctness "survive a substantive due process analysis and a *Mathews* [*v. Eldridge*, 424 U.S. 319 (1976)] test" (PBGC JS App. A, 28a; *id.* at 32a-33a n.24), but it held that the district court erred in failing to analyze the alleged bias of the trustees separately from the adequacy of the procedural safeguards built into the review process (*id.* at 19a). Thus, the court of appeals analyzed Yahn's procedural due process claim under cases such as *Schweiker v. McClure*, 456 U.S. 188 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); and *Tumey v. Ohio*, 273 U.S. 510 (1927).

Although the court of appeals acknowledged (PBGC JS App. A, 16a) that its decision was contrary to that of every other circuit to consider the issue,[9] the court held

---

9. *See Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund*, 762 F.2d 1137 (1st Cir. 1985) (en banc); *Bd. of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d

that multiemployer pension plan trustees are "biased" in favor of maximizing collections of withdrawal liability because the trustees have fiduciary duties of loyalty to the plan under Section 404 of ERISA, 29 U.S.C. §1104, and may be subject to personal liability for violating those duties under Section 409 of ERISA, 29 U.S.C. §1109 (PBGC JS App. A, 21a-25a). The court further held that the trustees' "manifest and significant bias" (*id.* at 24a) was not cured by limits on the scope of their decisionmaking authority (*id.* at 25a-27a). Instead, the court was of the view that the trustees have broad discretion to (1) select from among four statutory methods, or their own method, for allocating withdrawal liability; (2) determine appropriate actuarial "discount rates"; and (3) determine the applicability of several statutory exemptions to the Act's withdrawal liability provisions (*ibid.*). Accordingly, the court concluded that the trustees' role is "adjudicative" because "[t]he trustees perform the judicial task of making *case-by-case determinations* significantly affecting the property of employers" and "must frequently make complex legal and factual determinations" (*id.* at 26a-27a n.18 (emphasis added)). Finally, the court held that the opportunity for further review — specifically, the right to invoke arbitration and review in federal district court — did not remove the taint of the trustees' bias because, under the statutory presumptions of correctness, any subsequent proceedings would themselves be tainted by the initial decision of the supposedly biased trustees (*id.* at 27a-28a).

1396 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2116 (1985); *Washington Star Co. v. Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir.), *cert. denied sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers Int'l*, 467 U.S. 1259 (1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83*, 718 F.2d 628 (4th Cir.), *cert. denied*, 467 U.S. 1259 (1984).

For relief, the court of appeals determined that the statutory presumption of correctness accorded the trustees' liability determinations in arbitration could be severed from the remainder of the statute (PBGC JS App. A, 28a-33a).[10] Thus, the court rewrote the statute to require de novo determinations of withdrawal liability in arbitration proceedings. Such de novo proceedings, the court held, would satisfy the constitutional requirement of an impartial decisionmaker (*id.* at 31a-32a).[11]

Judge Seitz dissented from the majority's resolution of the constitutional question. He took issue with the court's view of the breadth of discretion available to the trustees in making determinations of withdrawal liability (PBGC JS App. A, 35a-39a), concluding that "whatever residual discretion the trustees enjoy is [not] inconsistent with due process" (*id.* at 39a). Judge Seitz also expressed concern that the court's invalidation of the statutory presumption of correctness "promises to frustrate severely the congressional enforcement scheme. Without the presumption the plan may well, as Congress

---

10. The court of appeals struck down only subparagraph (A) of Section 1401(a)(3), which accords a presumption of correctness to the trustees' determinations of liability and their application of various exemptions and mitigating provisions authorized by the Act. However, in its discussion of specific decisions purportedly made by the trustees, the court appeared to find that the selection of actuarial assumptions posed the greatest risk of harm to withdrawing employers (PBGC JS App. A, 18a, 26a). Yet the court did not in terms invalidate the presumption of correctness contained in subparagraph (B) of Section 1401(a)(3), which applies expressly to actuarial assumptions.

11. Upon learning that the court of appeals had held a provision of the MPPAA unconstitutional, the PBGC filed a motion to intervene for the purposes of seeking rehearing and further review, if necessary, in this Court. The court of appeals granted the PBGC's motion to intervene (PBGC JS App. D, 52a-53a), but it denied rehearing (PBGC JS App. E., 54a-55a).

feared, 'be helpless to resist dilatory tactics by a withdrawing employer — tactics that could, and could be intended to, result in prohibitive collection costs to the plan'" (*id.* at 40a (quoting *Senate Labor Summary* 21)).

The PBGC's and the Plan's petitions for rehearing en banc were denied over the dissenting votes of four judges (PBGC JS App. E, 54a-55a; Plan JS App. A, A-1).

SUMMARY OF ARGUMENT

The court of appeals erred in determining that pension plan trustees are impermissibly biased against withdrawing employers and in concluding that the presumption of correctness accorded to their decisions violates the Due Process Clause. Trustees would not satisfy their fiduciary duties, as the court of appeals erroneously assumed, by assessing the maximum withdrawal liability against withdrawing employers; instead, they have an obligation to make equitable assessments of withdrawal liability. Moreover, the decisions made in assessing withdrawal liability are not adjudicative decisions over which the trustees have significant discretion. The decisions at issue are made, in reality, by impartial decisionmakers.

The Due Process Clause is not violated by deferring to the decisions of private trustees. Decisions of trustees are ordinarily presumed correct under the well-established arbitrary and capricious standard, as are the decisions of other private parties, without raising due process concerns. The statutory presumption merely places a particular burden of proof on one party and upholds the decisions of trustees only if they are reasonable. The presumption thereby effectuates the congressional purpose of preserving the fiscal integrity of multiemployer pension plans; the alternative — de novo review — would threaten the financial soundness of those plans.

ARGUMENT

The heart of the court of appeals' holding that Section 1401 (a)(3)(A) is unconstitutional is its determination that pension fund trustees are impermissibly biased, as a matter of law, against withdrawing employers, and that the statutory presumption of correctness accorded to their decisions violates the Due Process Clause. In reaching this result, the court of appeals did not utilize the standards established by this Court to be used in evaluating whether or not a decisionmaker is impermissibly biased. In addition, the court of appeals erred in determining that pension fund trustees are biased against withdrawing employers. Application of the appropriate legal standards to a more realistic evaluation of the role of trustees demonstrates that those trustees cannot be considered biased, as a matter of law, and that Section 1401 (a)(3)(A) does not violate the Due Process Clause.

A. The Appropriate Constitutional Test For Decisionmaker Bias.

The seminal case for determining whether a judicial officer is impermissibly biased is *Tumey v. Ohio*, 273 U.S. 510 (1927). At issue in *Tumey* were state statutes that provided for trial of criminal charges by the mayor of the village where the crimes were committed. The mayor was vested with the authority to determine the guilt or innocence of an accused person and to order the imposition of a fine against the criminal defendant. In addition to his normal salary, the mayor received compensation from his service as a judge in two ways: first, the mayor received fees taxed against the defendant, but only if the defendant was convicted. Second, the mayor's village received a substantial portion of the fines assessed by him.

The Court first noted that "[a]ll questions of the judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." 273 U.S. at 523. However, the Court found that a criminal defendant is deprived of due process of law if the judge "has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Id.* The Court then found that the mayor had a direct, personal, pecuniary interest in convicting and fining criminal defendants because the mayor received payments if, and only if, the defendant was convicted.

Subsequent cases have affirmed that persons with a direct pecuniary interest in a case cannot sit in an adjudicative capacity on that case. In *Gibson v. Berryhill*, 411 U.S. 564 (1973), the district court held that members of the State Board of Optometry were so biased by personal pecuniary interest that they could not, consistent with the Due Process Clause, conduct hearings to determine whether other optometrists in competition with them should lose their licenses. This Court first stated: "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate those disputes." *Gibson v. Berryhill*, 411 U.S. at 579. The Court then deferred to the conclusion of the district court, with its superior understanding of local matters, that the pecuniary interests of the board members were substantial enough to render them impermissibly biased.

Most recently, in *Aetna Life Insurance Company v. Lavoie*, 106 S. Ct. 1580 (1986), this Court reaffirmed that a judicial officer with a direct financial stake in the outcome of a case could not sit in judgment on that case. In *Aetna Life*, the Alabama Supreme Court issued a 5-4 decision that clarified a previously unsettled area of the law and upheld an award of $3.5 million in punitive damages. However, one of the parties then discovered that

Alabama Supreme Court Justice Embry, voting in the majority in *Aetna Life*, was a plaintiff in a separate lawsuit that sought compensatory and punitive damages. That suit relied on the same legal theory first approved by the Alabama Supreme Court in *Aetna Life*.

Aetna Life then contended that the Alabama Supreme Court's decision should be overturned because Justice Embry's financial interest in the separate lawsuit denied it the right to an impartial decisionmaker. The Court first rejected the claim that Justice Embry's personal hostility towards insurance companies was sufficiently substantial bias to establish a constitutional violation. 106 S. Ct. at 1585. This Court then found that Justice Embry had a substantial pecuniary interest in reaching the result he did because the decision would favorably affect his pending lawsuit on an identical claim.

The Court distinguished the situation of the other justices of the Alabama Supreme Court, who were only potential class members in Justice Embry's suit. The Court found that although they might have a pecuniary interest in the suit, their interest was too slight and insubstantial to warrant the finding that they were not impartial decisionmakers. 106 S. Ct. at 1588. The Court acknowledged that evaluating the allegedly biasing interests of a decisionmaker involves matters of degree, and the amount of disqualifying bias " 'cannot be defined with precision.' " 106 S. Ct. at 1585 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Instead, bias must be evaluated on a case-by-case basis: "At some point '[t]he biasing influence . . . [will be] too remote and insubstantial to violate the constitutional constraints.' " 106 S. Ct. at 1588 (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980)).

Where the pecuniary interest of the decisionmaker has been less direct, this Court has found that the decisionmaker is less likely to be impermissibly biased. For example, in *Marshall v. Jerrico, Inc.*, 446 U.S. 238

(1980), an assistant regional administrator of the Department of Labor's Employment Standards Administration assessed a fine of $103,000.00 against Jerrico, Inc. The complaining party had an opportunity for a hearing before an administrative law judge, who reduced the fine. Jerrico then brought suit, alleging that this procedure violated the Due Process Clause because of the risk of bias inherent in an employee of the Employment Standards Administration assessing fines that would be used to fund the agency's budget. The Court found that the Due Process Clause was not violated by this procedure for two reasons: first, the assistant regional administrator, in assessing fines, was acting more in a prosecutorial capacity than in a judicial capacity. 446 U.S. at 243. Second, the biasing influence of the eventual receipt of fines by his agency was "too remote and insubstantial" to violate the Constitution. *Id.*

More recently, in *Schweiker v. McClure*, 456 U.S. 188 (1982), this Court upheld, against a challenge under the Due Process Clause, a procedure established by Congress to provide hearings on disputed claims for certain Medicare payments. The hearings were held by employees of private insurance carriers, and claimants did not have a right of appeal. 456 U.S. at 189. The Court first described the appropriate steps to be used in analyzing a claim that the hearing officers were impermissibly biased:

> As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities. We must start, however, from the presumption that the hearing officers who decide Part B claims are unbiased. This presumption can be rebutted by a showing of conflict of interest or some other specific reason for

> disqualification. But the burden of establishing a disqualifying interest rests on the party making the assertion. 456 U.S. at 195-96 (citations and footnote omitted).

The Court then found that there was no evidence in the record of an actual conflict of interest. The Court stated that "generalized assumptions of possible interest" were insufficient to demonstrate bias. 456 U.S. at 196. The Court then rejected an attempt to add an additional level of de novo review to the procedure established by Congress, stating:

> "[D]ue Process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). We have considered appellees' claims in light of the strong presumption in favor of the validity of congressional action and consistently with this Court's recognition of "congressional solicitude for fair procedure. . . ." *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979). Appellees simply have not shown that the procedures prescribed by Congress and the Secretary are not fair. . . . 456 U.S. at 198.

These cases, read together, set forth standards to be used to evaluate whether a due process violation exists. First, there is a "strong presumption" in favor of procedures established by Congress. *Schweiker v. McClure*, *supra*, 456 U.S. at 198; *see also Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *Walters v. National Association of Radiation Survivors*, 105 S. Ct. 3180, 3188-89 (1985). Second, there is a presumption that decisionmakers themselves are unbiased. *Schweiker v. McClure*, 456 U.S. at 195. Third, the party alleging a due process violation has the burden of presenting substantial evidence of decisionmaker bias. *Id.* Fourth, since due process is a flexible concept, *Morrissey v. Brewer*, 408 U.S. at 481, a determination whether a decisionmaker is

biased will depend on the facts of each case, for not every possibility of interest in the case warrants a finding of a due process violation. *See Aetna Life Insurance Co. v. Lavoie, supra*. In particular, a direct pecuniary interest of the individual decisionmaker is much stronger evidence of an impermissible bias than an indirect institutional interest. *Compare Aetna Life Insurance Co. v. Lavoie, supra, with Marshall v. Jerrico, Inc., supra*, and *Schweiker v. McClure, supra*. Finally, the function of the decisionmaker must be scrutinized to determine whether he or she is acting in a judicial capacity, since the test for decisionmaker bias only applies to adjudicative decisions. *Marshall v. Jerrico, Inc.*, 446 U.S. at 243.

B. The Court Of Appeals Erroneously Concluded That Trustees Are Inevitably Biased.

In the first part of its due process analysis, the court of appeals found that pension fund trustees are impermissibly biased, as a matter of law. Because Yahn raised a facial constitutional challenge to the MPPAA, the court of appeals, quite properly, did not base this conclusion on evidence in the record that the Plan's trustees, or trustees in general, are biased against withdrawing employers. Instead, the court made findings of bias based upon its evaluation of the legal status and duties of trustees. However, the court did not consider all relevant factors in determining whether trustees are biased, but erroneously focused on one allegedly biasing consideration to the exclusion of countervailing factors. A careful reading of the court's analysis reveals that it is fundamentally flawed in its reasoning and in its failure to utilize the correct standards for evaluating the bias of decisionmakers.

The court of appeals correctly recognized that a presumption exists that decisionmakers are unbiased, and that the presumption can be rebutted by a showing of a

conflict of interest. The primary conflict of interest identified by the court was the following: "[A]s fiduciaries of the plan, trustees have a natural inclination and may even consider it a duty to maximize the fund by extracting as much money as possible from withdrawing employers." (PBGC JS App. A, 21a). The court held that this alleged conflict was an adequate showing of bias, unless countervailing factors were shown.

The court buttressed its conclusion by finding that the trustees had potential personal liability to the Plan under 29 U.S.C. §1109 (PBGC JS App. A, 22a). The court of appeals misunderstood the extent of their potential personal liability, for it later referred to the trustees' "consequent personal liability if the plan is not adequately funded. . . ." (PBGC JS App. A, 24a). Of course, trustees are not personally liable merely because the plan is not fully funded; liability only attaches if the trustees breach their fiduciary duties. *See* 29 U.S.C. §1109(a).

What apparently underlies the cout of appeals' statements about the personal liability of plan trustees is its belief that trustees face the possibility of being held personally liable to the plan if they do not assess the maximum withdrawal liability against employers. The leg,slative history of the MPPAA reveals that this concern is groundless. The House Report specifically states that an assessment of less than the maximum possible withdrawal liability is *not* a breach of fiduciary duty:

> Plan fiduciaries are given a great deal of flexibility to strike a balance among the competing considerations of encouraging new entrants, discouraging withdrawals, easing administrative burdens, and protecting the financial soundness of a fund. *The committee wishes to make it clear that in choosing the rules that would eliminate or reduce liability, the choice of such a rule is not per se a violation of a fiduciary standards;* the determination must be

> made as to whether the fiduciary has acted reasonably and in the interest of plan participants and beneficiaries and otherwise in accordance with the fiduciary standards. H.R. Rep. No. 869, Pt. I, 96th Cong., 2d Sess. 67 (1980) (emphasis added).

Thus, trustees do not face personal liability for failure to maximize withdrawal liability. Their judgments as to withdrawal liability are evaluated with the deferential "arbitrary and capricious" standard used to evaluate decisions concerning the fund. *See* pages 27-29 *infra*. The court of appeals erred in determining that trustees are biased by the fear of potential personal liability.

The court's finding that trustees are biased by a supposed duty to the fund to maximize withdrawal liability was also erroneous. In fact, trustees must consider many different, competing factors in assessing withdrawal liability, as Congress found in the passage quoted above. The overriding purpose is *not* to assess the maximum withdrawal liability, but to choose the course of action that is in the best interests of the fund. As the Court of Appeals for the First Circuit held in *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137 (1985) (en banc), trustees "would not meet their fiduciary duty to the fund, for example, if they set excessively high withdrawal liabilities which would have the effect of discouraging future participation." 762 F.2d at 1142-43. Instead, Congress has directed that trustees must consider all relevant factors and "develop an allocation method which meets the basic purpose of withdrawal liability *and is equitable to contributing employers*." H.R. Rep. No. 869, Pt. I, 96th Cong., 2d Sess. 73 (1980) (emphasis added). Thus, it is the fiduciary duty of trustees to be equitable to employers and consider what assessment is best for the plan.

The court of appeals dismissed this showing by stating: "The due process right to an unbiased

decisionmaker is not satisfied by speculation that countervailing concerns may restrain clearly biased parties from excessively harsh judgments." (PBGC JS App. A, 23a) (footnote omitted). This statement is internally inconsistent with the court's earlier statement that trustees were considered biased because of their duty to maximize withdrawal liability "[a]bsent countervailing factors." (PBGC JS App. A, 21a). More importantly, it is incorrect to discount a factor showing a lack of bias; the proper approach is to consider whether all relevant factors amount to evidence sufficient to rebut the presumption of lack of bias.

If all factors concerning the trustees' interests are evaluated, the conclusion is evident that trustees are not impermissibly biased against withdrawing employers. Initially, it is important that the trustees do not have any *personal* interests that would render them biased.[12] Instead, they have only *institutional* interests based upon their duty of loyalty to the plan. As Congress found, in

---

12. For this reason, the court of appeals' reliance, *see* PBGC JS App. A, 23a-24a, on *Gibson v. Berryhill*, 411 U.S. 564 (1973), and on certain language in *Friedman v. Rogers*, 440 U.S. 1 (1979), is misplaced. Those decisions concerned allegations that decisionmakers had personal, financial stakes in the outcome of cases before them. Pension plan trustees do not have any personal, financial stakes in the determination of withdrawal liability.

The court of appeals also relied upon *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), as supporting its decision. While *Ward* affirms the right to an impartial decisionmaker established in *Tumey v. Ohio*, *supra*, its holding does not control this case. In *Ward*, the mayor of Monroeville sat as a judge of ordinance violations and traffic offenses, with the power to adjudge guilt and levy fines on defendants. The mayor also had executive responsibility for village finances, and the revenues derived from the fines, costs and fees assessed in the mayor's court were a "major part" of the village's income — close to 50%. 409 U.S. at 58. Thus, the mayor had an unequivocal bias, with no countervailing interests, in favor of convicting criminal defendants and assessing the maximum possible fines. Pension plan trustees, by contrast, do not have an unequivocal interest in assessing the maximum withdrawal liability.

the passage quoted above, the plan's interests include encouraging new entrants, easing administrative burdens, and protecting the fiscal integrity of the plan. These interests are served by being equitable to employers, as Congress suggests, because an equitable plan would attract new contributors, and equitable assessments would minimize the amount of challenges, and resulting litigation, brought by withdrawing employers against their assessments. Finally, if the plan provides for equitable withdrawal liability assessments, then employers will be less likely to seize upon the first opportunity to withdraw from a plan. In sum, the institutional interests of plan trustees do not require them to be biased against withdrawing employers.

When considered in light of the procedural due process principles established by this Court, the interests of trustees are insufficient to render them impermissibly biased decisionmakers. The trustees do not have disqualifying personal loyalties, but only institutional loyalties that are required by Congress. The trustees are not obligated to maximize withdrawal liability, but to make equitable assessments. It follows that the court of appeals erred in finding that trustees are inevitably biased against withdrawing employers,[13] given the "strong presumption" in favor of procedures established by Congress, *Schweiker v. McClure*, 456 U.S. at 200, and the presumption that decisionmakers are unbiased. *Id.* at 195.

C. Multiemployer Pension Plan Trustees Do Not Act As Adjudicative Decisionmakers When They Calculate Withdrawal Liability.

As this Court recognized in *Marshall v. Jerrico, Inc.*, *supra*, a functional analysis of the decisionmaker's role is

13. Of course, withdrawing employers are free to show, in individual cases, that the trustees were impermissibly biased against them.

necessary because only quasi-judicial or adjudicative decisions can be challenged as impermissibly biased. The court of appeals found that three different types of decisions made by the trustees were subject to their allegedly disabling bias: the choice of an allocation method, the choice of actuarial assumptions, and the decision to grant any of the statutory exemptions. However, these decisions are not adjudicative in nature. In making each of these decisions, the trustees' discretion is either severely limited or subject to independent review, so that any bias that does exist is irrelevant.

The trustees choose an allocation method by either selecting one of four methods prescribed by Congress in the MPPAA or using a method of their own design, which must be approved by the PBGC. If the trustees do not select a method, then they must use the "basic" or "presumptive" method, which is the method used by the trustees in this case. Once a method is selected, the trustees must apply it uniformly to all withdrawing employers. The trustees cannot change the allocation method to be used for a specific withdrawal: unless the employer consents, the plan must use the method in effect on the date of the withdrawal. *See* 29 U.S.C. §1394(a); H. R. Rep. No. 869, Pt. I, 96th Cong., 2d Sess. 85 (1980). As Judge Seitz noted in his dissent in the court of appeals: "Thus, when Yahn withdrew from the pension plan, the trustees simply had no choice about which method to employ: either the method specified by amendment, or — if the plan was never amended — the presumptive method." (PBGC JS App. A, 36a).

The choice of allocation method is not the type of decision contemplated by the due process analysis. First, this decision is legislative in nature, not adjudicative, because the allocation method is a rule chosen to apply to all withdrawing employers and cannot be changed on a case-by-case basis. The impartial decisionmaker requirement does not apply to this sort of legislative function. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982);

Marshall v. Jerrico, Inc., 446 U.S. 238, 242-43 (1980); *see also* PBGC JS App. A, 36a (Seitz, J., dissenting). Surely the Due Process Clause would not be violated if the mayor of Monroeville promulgated an executive order, applicable to all future violators, that set high fines for traffic violations, even if the mayor's purpose was to maximize village revenues.

Second, the scope of the discretion exercised by the trustees in selecting an allocation method is too narrow to raise due process concerns. Trustees can ony choose one of four methods prescribed by Congress. It is not disputed in this case that those methods are fair. If the trustees design their own method, that method must be approved by an impartial third party, the PBGC. The real decisionmaker in designing allocation methods is an impartial one, not the trustees. Due process is not violated merely because the trustees may choose which of several fair methods is to be used.

The second type of decision found by the court of appeals to be influenced by bias is the choice of actuarial assumptions used for actually calculating the withdrawal liability. That choice, however, is made by the plan's actuary, which is a neutral decisionmaker, governed by ethical and professional standards. The assumptions selected by the actuary must be "reasonable" and "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. §1393(a). There is no reason to believe that plan actuaries in general, or this Plan's actuary, Peat, Marwick, Mitchell & Co., would be biased against either withdrawing employers or any particular withdrawing employer. Obviously, the withdrawing employer would be free to make that showing in a particular case, but for the purpose of facial constitutional analysis, pervasive or institutional bias on the part of actuaries cannot be shown to exist.[14]

14. Although trustees are not bound to accept assumptions recommended by the actuary, the fact that the trustees rejected their own actuary's recommendations would be powerful evidence in an

An arbitrator's deference to the reasonable decisions of the plan's actuary does not violate the Due Process Clause. Because the actuarial assumptions selected by the actuary are based upon "the actuary's best estimate of anticipated experience under the plan," the actuary must take into account a complex series of factors concerning the plan, such as the available data concerning plan participants, anticipated rates of return on the plan's investments, the plan's investment policy, and the actuary's projection of economic conditions. Obviously, the plan's actuary is in the best position to assemble the relevant information and assess these factors. By its very nature, the determination of actuarial assumptions is a "best estimate," and another actuary might reach a different estimate. The estimations inherent in setting actuarial assumptions can be second-guessed, as economic projections cannot be conclusively proven. *See Senate Labor Summary* 20-21. The MPPAA merely recognizes that in this situation, the estimate of the plan's actuary is the most reliable and accurate, as long as it is reasonable. The Due Process Clause is not violated because deference is given to the reasonable judgments of the person in the best position to make them.

The third type of allegedly biased decision made by trustees is whether any of the statutory exemptions apply. The court of appeals found that the trustees' supposed bias would affect their decision to find a withdrawing employer exempt. Even assuming, *arguendo*, this is true, the bias would be meaningless because decisions as

---

arbitration hearing that the assessment of withdrawal liability was unreasonable. *See Keith Fulton*, 762 F.2d at 1141 n.3 (citing *Woodward Sand Co. and Operating Engineers' Pension Trust*, 3 EBC (BNA) 2351 (1982) (Kaufman, Arb.)); PBGC JS App. A. 38a & n.3. As a practical matter, the trustees are likely to follow the actuary's recommendation or risk having the assessment overturned as unreasonable by an arbitrator.

to the applicability of statutory exemptions would be reviewed de novo. The PBGC has concluded that legal determinations made by the trustees are not presumed correct in arbitration. PBGC JS at 21. The Plan agrees with the PBGC that the presumption of correctness in Section 1401(a)(3)(A) does not apply to legal questions decided by the trustees.[15] Thus, to the extent that the court of appeals relied upon the trustees' alleged bias in applying statutory exemptions to find Section 1401(a)(3)(A) unconstitutional, the court of appeals erred.

D. The Presumption Of Correctness Accorded To Trustees' Assessments Of Withdrawal Liability Is Consistent With The Arbitrary And Capricious Standard Used To Evaluate Decisions By Trustees.

The foundation of the court of appeals' finding of a due process violation is that it is inappropriate to accord a presumption of correctness to the decision of trustees because they are not neutral and detached. Instead, the court of appeals would have trustees' withdrawal liability assessments reviewed de novo. However, the standard of review at issue in this case is the conceptual equivalent of the well-established arbitrary and capricious standard used to evaluate all trustees' decisions concerning a pension plan.

When it enacted ERISA, Congress did not explicitly specify the standard of review to be used to evaluate decisions made by trustees of ERISA funds. This Court has recognized that Congress intended to invoke and adopt

15. *Cf. Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1135 (9th Cir. 1984) (under the arbitrary and capricious standard, trustees' decisions on questions of law can be overturned if simply "erroneous"), *cert. denied*, 469 U.S. 1189 (1985); *Washington Post v. Washington-Baltimore Newspaper Guild, Local 35*, 787 F.2d 604, 606 (D.C. Cir. 1986) (despite deference normally given to decisions of labor arbitrators, their decisions on questions of statutory construction are reviewed de novo).

the common law of trusts to define the powers and duties of trustees. *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 105 S. Ct. 2833, 2840 (1985). Although this Court has not specifically addressed the question, the lower federal courts unanimously agree that as part of its adoption of the common law of trusts, Congress intended that trustees' decisions would be evaluated under the deferential "arbitrary and capricious" standard. *See Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079, 1083 (D.C. Cir. 1986); *Jestings v. New England Telephone and Telegraph Co.*, 757 F.2d 8, 9 (1st Cir. 1985); *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984); *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 187 (3d Cir. 1984); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir. 1985); *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357, 362 (5th Cir. 1981), *cert. denied*, 454 U.S. 836 (1981); *Crews v. Central States, Southeast and Southwest Areas Pension Fund*, 788 F.2d 332, 336 (6th Cir. 1986); *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820, 824 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Bueneman v. Central States, Southeast and Southwest Areas Pension Fund*, 572 F.2d 1208, 1209 & n.3 (8th Cir. 1978); *Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1135 (9th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *Carter v. Central States, Southeast and Southwest Areas Pension Fund*, 656 F.2d 575, 576 (10th Cir. 1981); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1530-31 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 410 (1985); *see generally* Comment, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 Duq. L. Rev. 1033 (1985).

Under the arbitrary and capricious standard, as with the standard for reviewing withdrawal liability assessments, there is no opportunity for a de novo hearing. *See, e.g., Wardle v. Central States, Southeast and Southwest*

Areas Pension Fund, 627 F.2d at 824; *Carter v. Central States, Southeast and Southwest Areas Pension Fund*, 656 F.2d at 576; *Crews v. Central States, Southeast and Southwest Areas Pension Fund*, 788 F.2d at 336. Like the decisions of an administrative agency, the decisions of trustees receive limited review, "taking into account the expertise of professionals operating in a complex field. Courts will substitute their judgment for that of trustees only if the trustees' actions are not grounded on any reasonable basis. Choices between reasonable alternatives, it follows, are for the trustees, not the courts." *Stewart v. National Shopmen Pension Fund*, 795 F.2d at 1083. "[T]he standard exists to ensure that administrative responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional." *Berry v. Ciba-Geigy Corp.*, 761 F.2d at 1006.

Although the Section 1401(a)(3)(A) standard is described differently from the arbitrary and capricious standard, the two standards are essentially equivalent. Both standards presume that the trustees' decisions are correct and place the burden of proof on the objecting party. Both standards require a reviewing court to uphold the choices of the trustees between reasonable alternatives. Finally, under both standards the trustees are permissibly "biased", *i.e.*, their decisions are controlled by their duty of loyalty to the plan.

The point of demonstrating that the two standards are fundamentally equivalent is this: it is beyond dispute that the well-established arbitrary and capricious standard does not violate the due process rights of persons challenging plan decisions, such as a denial of an application for benefits from the fund. Plan beneficiaries do not receive a hearing before an impartial decisionmaker, and yet their entitlement to important property rights, such as pension rights, can be adjudged without any right to de novo review of that decision. In both situations, the partiality of the trustees does not constitute a

due process violation because whatever bias exists is a permissible type of bias.

The bias of the trustees is permissible because the trustees are obligated by Congress to be biased in favor of pension plans. This "bias" mirrors the "bias" of the MPPAA. The primary concern of Congress in enacting the MPPAA was to insure the financial soundness of multiemployer pension plans and alleviate the problem of employer withdrawal from those plans. *See Connolly v. PBGC*, 106 S. Ct. 1018, 1020-22 (1986); *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 721-23 (1984). While the effect of the MPPAA is to benefit multiemployer plans at the expense of withdrawing employers, this Court has held that the MPPAA is not, for that reason, unconstitutional. *Connolly*, 106 S. Ct. at 1024-26. By its very nature, an assessment of withdrawal liability is intended to benefit the interests of the plan over those of a withdrawing employer. Thus, it is entirely appropriate that the trustees assess withdrawal liability and that their judgments are presumed correct, for what is at issue is what is best for the plan. Put another way, the alleged "bias" of the trustees is identical to the "bias" of Congress in enacting the MPPAA and the "bias", or purpose, of the statute itself — namely, to insure the integrity of pension plans. The procedure for assessing withdrawal liability effectuates Congress' purpose in enacting the MPPAA by deferring to decisions of the persons best able to judge what is best for the plan. In short, because the MPPAA and the assessment of withdrawal liability are intended to serve pension plans, the trustees' loyalty to those plans is not an *impermissible* bias.

Moreover, the presumption of correctness attached to trustees' decisions is not unique. An analogous presumption exists in the field of labor law. A union's decision not to process a member's grievance to arbitration is not reviewed de novo. Instead, the union's decision that the grievance lacked merit is presumed correct and can only be challenged if the member can show that the

union acted arbitrarily, discriminatorily, or in bad faith in refusing to press the grievance. *See Vaca v. Sipes*, 386 U.S. 171, 190-94 (1967); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). This Court has repeatedly reaffirmed the validity of the *Vaca v. Sipes* standard, *see Clayton v. United Automobile Workers*, 451 U.S. 679 (1981); *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983); *Bowen v. United States Postal Service*, 459 U.S. 212 (1983), without a suggestion that the member's due process rights might be violated by deferring to the union's decision. As with decisions by pension fund trustees, courts defer to the decisions of unions because that deference effectuates important federal policies, namely, those that favor the resolution of labor-management disputes through grievance and arbitration procedures and the primary responsibility of the collective bargaining representative to negotiate and resolve those disputes. *See Vaca v. Sipes*, 386 U.S. at 191-94. Similarly, the presumption of correctness given to decisions by plan trustees promotes federal policies that favor the fiscal integrity of pension plans and disfavor judicial interference into the management of those plans.

In addition to their role in promoting federal policies, these presumptions of correctness — the arbitrary and capricious standard, the *Vaca v. Sipes* standard, and the standard applicable to withdrawal liability assessments — are all constitutional because they are only evidentiary presumptions. The presumptions merely place the burden of proof on a particular party and establish the legal standard that must be satisfied by that party. These presumptions are constitutional because the burden of proof can be satisfied and the presumptions can be rebutted. Withdrawing employers receive due process because they do have the opportunity for hearings in which they can prevail if they satisfy their burden of proof. The mere fact that a particular burden is placed on them does not violate the Constitution.

E. The Court of Appeals' Ruling That Assessments Of Withdrawal Liability Are To Be Determined De Novo By An Arbitrator Would Threaten The Financial Stability Of Pension Funds.

The court of appeals' solution to the defect it perceived in the MPPAA was to rule that arbitrators should decide the proper amount of withdrawal liability de novo. As Judge Seitz noted in dissent, this decision "is an open invitation to proliferated and expanded arbitration proceedings." (PBGC JS App. A, 35a). A problem of this magnitude cannot be lightly disregarded. Withdrawing employers who object to their assessments of liability will be able to force a lengthy hearing on the proper determination of withdrawal liability. The arbitrator will need to be educated about every aspect of the fund in order to understand the plan's withdrawal liability requirements. For example, because actuarial assumptions are supposed to "offer the actuary's best estimate of anticipated experience under the plan," 29 U.S.C. §1393(a), the arbitrator would have to be informed of the plan's entire experience. To present its case, each side would have to hire experts and incur large attorneys' fees. The plan would then be subject to an arbitrator's independent determination of withdrawal liability.

In addition to the immediate and substantial costs of the arbitration hearing, there is no guarantee that an arbitrator considering the assessment of a second withdrawing employer will make an assessment that is consistent with the first arbitrator's decision. As a result, the plan may lack the consistency and predictability that is essential to good financial management.

The inevitable result of this change in procedures is to harm the financial soundness of multiemployer plans, contrary to the will of Congress in enacting the MPPAA. Withdrawing employers will be able to use the threat of lengthy, costly arbitration hearings to force plans to accept smaller withdrawal liability assessments than they

would be entitled to receive. If the plans choose not to accept such low settlement offers, they would "be helpless to resist dilatory tactics by a withdrawing employer — tactics that could, and could be intended to, result in prohibitive collection costs to the plan." *Senate Labor Summary* at 21 (quoted in *Keith Fulton*, 762 F.2d at 1143 n.7). Congress found that the presumption of correctness was "necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination." H.R. Rep. No. 869, Pt. I, 96th Cong., 2d Sess. 86 (1980). The court of appeals' decision would eviscerate the protections designed by Congress to assist multiemployer plans, with little, if any, corresponding legitimate benefit.

CONCLUSION

The decision of the court of appeals that Section 1401(a) (3) (A) violates the Due Process Clause should be reversed and the case remanded for further proceedings.

Respectfully submitted,

RICHARD H. MARKOWITZ*
PAULA R. MARKOWITZ
R. DAVID WALK, JR.
Markowitz & Richman
121 South Broad Street
1100 North American Building
Philadelphia, PA 19107
(215) 875-3100

Counsel of Record